

**THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

SAINT MICHAEL ACADEMY, INC.

Plaintiff

v.

Case No.

ROBERT GORDON, in his official
capacity as the Director of the Michigan
Department of Health and Human Services

Defendant.

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This case arises out of the same transaction or occurrence and involves one or more of the same parties as *Michigan Association of non-Public Schools, et al v. Gordon*, Case No. 1:20-cv-01174

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

*“But even in a pandemic, the Constitution cannot be put away and forgotten.”
Diocese, 2020 WL 6948354, at *3.*

Plaintiff Saint Michael Academy brings this Complaint for Declaratory and Injunctive Relief, against the above-named Defendant Robert Gordon, in his official capacity as the Director of the Michigan Department of Health and Human Services, and states as follows:

1. This is a federal civil rights action brought under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983, challenging the Defendant's orders prohibiting Plaintiff from conducting in-person instruction for grades 9 through 12.

PARTIES

2. Plaintiff Saint Michael Academy, Inc. (also "SMA" or "St. Michael"), is a private Catholic school located in the city of Petoskey, Emmet County, Michigan. It is a nonprofit corporation, incorporated under the laws of Michigan. It serves grades 7 through 12.

3. Defendant Robert Gordon is the Director of the Michigan Department of Health and Human Services ("Director Gordon").

JURISDICTION AND VENUE

4. This is a civil rights action that raises federal questions under the United States Constitution and laws of the United States, particularly the First and Fourteenth Amendments and 42 U.S.C. §1983.

5. This Court has original jurisdiction over these federal claims under 28 U.S.C. §§ 1331 and 1343.

6. This Court has authority to award Plaintiff's requested declaratory relief under 28 U.S.C. §§ 2201 and 2202; and the requested injunctive relief under 28 U.S.C. §1343 and Fed. R. Civ. P. 65.

7. Plaintiff's claim for an award of reasonable costs of litigation, including attorney fees and expenses, is authorized by 42 U.S.C. §1988 and other applicable law. Plaintiff's claim for nominal damages is authorized by 42 U.S.C. §1983.

8. Venue is proper under 28 U.S.C. §1391(b) because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this district and Plaintiff and Defendant conduct business in this district.

INTRODUCTION

9. On November 15, 2020, Director Gordon, as Director of the Michigan Department of Health and Human Services, issued an Emergency Order under MCL 333.2253 – Gatherings and Facemask Order (“November Order”). Exhibit 1. This Order, which took effect on November 18, 2020, prohibited Michigan public and nonpublic high schools from conducting in-person instruction. Without citing any scientific data relating to the impact of COVID-19 on high school students versus grade school students, this order closing high schools nevertheless allowed for in-person instruction for prekindergarten through eighth grade, and for pupils who are English Language Learners or participants in special education services. The November Order remained in effect until December 8, 2020.

10. On December 7, 2020, Director Gordon, again without citing any pertinent scientific data relating to the COVID-19 impact on high school students, issued a new and similar Order (“December 7 Order” or “current Order”) which among other things continues to prohibit public and nonpublic high schools from conducting in-person instruction, while permitting grade school instruction, trade school instruction, and other gatherings. This current Order took effect on December 9, 2020 and remains in effect until December 20, 2020. Exhibit 2.

11. Director Gordon threatens to charge those who violate his current Order with a misdemeanor punishable by imprisonment of up to 6 months and/or a fine of \$200. He also threatens those who violate his current Order with enforcement of another State provision namely,

imposition of a civil fine of up to \$1,000 for each violation or day that a violation continues. He further specifically authorizes law enforcement officers to investigate and enforce those violations.

12. As will be more fully discussed below, Director Gordon's current Order is an unjustified burden on St. Michael's fundamental right to the free exercise of religion which does irreparable harm to the school and its students.

13. As of the date of filing this Complaint, *no St. Michael student or faculty member has been infected by the COVID-19 virus. Moreover, no child age 0-17 has died in Michigan.*¹

14. In Emmet County, where Plaintiff is located, there have been, to date, 29 deaths over all age groups attributed to the COVID-19 virus.² In Plaintiff's Emergency Preparedness Region, Region 7, which encompasses 19 counties and 11 hospitals,³ 128 adults are currently hospitalized due to COVID-19, including 47 ICU patients.⁴ *Zero children are hospitalized.*⁵

15. The Declaration of Dr. Jayanta Bhattacharya, a world-renowned scientific expert, professor of Medicine at Stanford University, and author of 136 articles in peer-reviewed journals, attached to this Complaint as Exhibit 3, presents scientific analysis which shows that prohibiting in-person instruction for pupils in grades 9 through 12 as does Director Gordon's current Order, is not warranted by either transmission or mortality data, and causes these students great harm. Dr.

¹ Centers for Disease Control, Provisional Covid Death Counts by Sex, Age and State, in Michigan <https://data.cdc.gov/NCHS/Provisional-COVID-19-Death-Counts-by-Sex-Age-and-S/9bhg-hcku/data> (accessed Dec. 9, 2020)

² See Michigan.gov, "Coronavirus," Michigan (cumulative) Data, <https://www.michigan.gov/coronavirus/> (accessed Dec. 9, 2020)

³ Michigan.gov, MDHHS – Region 7, "Regional Trauma Networks," https://www.michigan.gov/mdhhs/0,5885,7-339-71551_69345_69350_69368-335112--,00.html (accessed Dec. 9, 2020)

⁴ See Michigan.gov, "Coronavirus," Michigan Statewide Available PPE and Bed Tracking, "Covid-19 Metrics, Region 7" <https://www.michigan.gov/coronavirus/0,9753,7-406-98159-523641--,00.html> (accessed 12/3/20)

⁵ *Id.*

Bhattacharya concludes that “it is a public health priority that St. Michael Academy remain open for all grade levels.” Exhibit 3, ¶56.

FACTUAL BACKGROUND

COVID-19 and Young People

16. Since March 2020, the State of Michigan, like the rest of the United States and the world, has been struggling to understand and address the COVID-19 pandemic.

17. In the nine months since this pandemic first caused shutdowns in the United States, some important facts have emerged. We now know, for example, that the virus impacts the elderly and those with pre-existing conditions far more than it does the young and healthy. A large group of well-credentialed doctors and scientists have publicly described this phenomenon, saying, “We know that vulnerability to death from COVID-19 is more than a thousand-fold higher in the old and infirm than the young. Indeed, for children, COVID-19 is less dangerous than many other harms, including influenza.”⁶ Examination of data made available online by the Centers for Disease Control and Prevention (“CDC”) also bears this out.⁷

18. In addition to their small to negligible mortality rate, school age children and young people are not significant vectors of transmission for the COVID-19 virus. Exhibit 3 ¶¶ 25-43 Dr. Bhattacharya states, “The overwhelming weight of scientific data suggests that the risk of transmission of the virus from younger people aged 18 and below to older people ranges in a gradient from negligible to small.” *Id.* ¶ 25.

⁶ Drs. Martin Kulldorff, Sunetra Gupta, Jayanta Bhattacharya, et al., “The Great Barrington Declaration,” <https://gbdeclaration.org>, (accessed Dec. 3, 2020).

⁷ Centers for Disease Control, “Provisional COVID-19 Death Counts by Sex, Age, and State,” <https://data.cdc.gov/NCHS/Provisional-COVID-19-Death-Counts-by-Sex-Age-and-S/9bhg-hcku/data> (accessed Dec. 9, 2020).

19. On November 19, 2020, Dr. Robert Redfield, the Director of the Centers for Disease Control, acknowledged that “extensive data” “strongly supports” the safety of K-12 schools, that such schools are “one of the safest places [students] can be” during the pandemic, and that these schools are not serving as vectors of transmission for COVID-19:⁸

Today there’s **extensive data** that we have—we’ve gathered over the last two to three months—that confirm **that K-12 schools can operate** with face-to-face learning and they can do it **safely** and they can do it **responsibly** ... **The infections that we’ve identified in schools when they’ve been evaluated were not acquired in schools.** They were actually acquired in the community and in the household.

The truth is, for kids K-12, one of the safest places they can be, from our perspective, is to remain in school, and it’s really important that following the data, making sure we don’t make emotional decisions about what to close and what not to close, and I’m here to say **clearly the data strongly supports** that K-12 schools—as well as institutes of higher learning—really are not where we’re having our challenges.⁹

20. On November 29, 2020 Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, joined the CDC Director in confirming that children should be in school, and they are not significant vectors of transmission, saying, “The default position should be to try as best as possible within reason to keep the children in school or to get them back to school. ... If you look at the data, the spread from children and among children is not very big at all ...”¹⁰

⁸ Saavedra, Ryan. “CDC Director: Schools Among ‘Safest Places’ Kids Can Be, Closing Schools An ‘Emotional Response’ Not Backed by Data.” *Daily Wire*. Nov. 19, 2020. <https://www.dailywire.com/news/cdc-director-schools-among-safest-places-kids-can-be-closing-schools-an-emotional-response-not-backed-by-data> (accessed Dec. 9, 2020)

⁹ *Id.* (emphases added).

¹⁰ Wigfall, Catrin, “Dr. Fauci Flip Flops on School Closures, Now Urges Schools to Reopen,” *Center of the American Experiment*, Education, Dec. 4, 2020 <https://www.americanexperiment.org/2020/12/dr-fauci-flip-flops-on-school-closures-now-urges-schools-to-reopen/#> (accessed Dec. 9, 2020).

21. Dr. Bhattacharya agrees that children and young people should be in school and points out that Director Gordon's orders are inconsistent with "the best scientific evidence regarding the safety of opening primary and secondary schools to in-person learning," and are further inconsistent with "guidelines provided by both the World Health Organization ("WHO") and the US Centers for Disease Control for school reopening." Exhibit 3 ¶19.

22. According to the CDC, harms of extended school closures include the following:

- a. "severe learning loss" for all students, but especially students with special needs and disabilities;
- b. widening of income and racial disparities in educational outcomes for children;
- c. hampered development of social and emotional skills by children and potential harm to child mental health;
- d. exposure of children to heightened risk of "physical, sexual, and emotional maltreatment and abuse" at home from some families;
- e. nutritional deprivation of poor children due to the cessation of school meal programs; and
- f. sharp reduction in regular physical activity by children in the absence of physical education programs.

Exhibit 3 ¶ 22 (citation omitted). CDC data also show that, as of November 13, 2020, mental health visits for children age 12-17 had increased over 30% compared to 2019, and are linked to "mitigation efforts, including anxiety about illness, social isolation, and interrupted connectedness to school."¹¹

23. According to Dr. Paul Peterson, the Henry Lee Shattuck Professor of Government and the Director of the Program on Education Policy and Governance at Harvard University, and

¹¹Leeb, Rebecca T., Ph.D., Bitsko, Rebecca H., Ph.D., et al., Centers For Disease Control and Prevention, *Morbidity and Mortality Weekly Report*, "Mental-Health Related Emergency Department Visits Among Children Aged <18 Years During Covid-19 Pandemic—United States, January 1-October 17, 2020." Nov. 13, 2020. <https://www.cdc.gov/mmwr/volumes/69/wr/mm6945a3.htm> (accessed Dec. 9, 2020).

a Senior Fellow at the Hoover Institution at Stanford University, the question whether schools should be open or closed in light of COVID-19 “isn’t even close.” Declaration of Dr. Paul Peterson, Exhibit 4, ¶ 8. Dr. Peterson sets forth data that help demonstrate, for example, the deficiencies of recent switches to online learning. *See* Exhibit 4, ¶¶ 15-19

24. In Petoskey, Michigan, the superintendent of public schools issued a December 3, 2020 press release asking Governor Gretchen Whitmer to reopen the local public high school, explaining that online classes are “not as good as in-person” and “not in the best interest of kids.”¹²

25. Dr. Richard Brake, Headmaster at St. Michael Academy, explains that there is “no comparison” between online and in-person learning. Declaration of Dr. Richard Brake, Exhibit 5 ¶ 24.

26. Around the country, the switch to online learning has been associated with higher student failure rates. For example, some northern California school districts are seeing a 50% increase in failure rates.¹³ In Texas, many more students are failing at least one class.¹⁴ Forty-two percent of students in one Houston school district are failing one or more classes.¹⁵ Poor grades

¹²Fellows, Jillian, Petoskey, “Petoskey schools superintendent asks Whitmer to allow safe reopening of high school,” *Petoskey News Review*, Dec. 3, 2020, https://www.petoskeynews.com/featured-pnr/petoskey-schools-superintendent-asks-whitmer-to-allow-safe-reopening-of-high-school/article_fbc650a4-9859-5b5e-ae83-ad44ab1e8d89.html (accessed Dec. 9, 2020)

¹³ Woolfold, John. News, Education, “Coronavirus: Failing Grades Spike with Fall Term Distance Learning,” *The Mercury News* (Nov. 1, 2020) <https://www.mercurynews.com/2020/11/01/coronavirus-failing-grades-spike-with-fall-term-distance-learning/> (accessed Dec. 9, 2020)

¹⁴ <https://www.texastribune.org/2020/10/23/texas-students-remote-learning-failing-schools/>

¹⁵ Swaby, Aliyya, “High Failure Rates Fuel Calls to Return Texas Students to Classrooms” *The Texas Tribune*, Oct. 23, 2020, <https://www.click2houston.com/news/local/2020/12/02/42-hisd-students-failing-one-or-more-classes-amid-covid-19-pandemic/> (accessed Dec. 9, 2020)

are “surging” in the Los Angeles Unified School District, per newly released data.¹⁶ Failure rates “in math and English jumped as much as six-fold” in areas of Montgomery County, Maryland.¹⁷

St. Michael Academy

27. **Brief History.** In 2012, a committee of Catholic parents from Emmet, Cheboygan, and Charlevoix counties came together to prayerfully discern the need and desire for the establishment of a Catholic high school within the greater Petoskey area. Prior to St. Michael’s 2013 founding, and since the mid-1970’s, only prekindergarten through eighth grade instruction was available in a Catholic setting anywhere in these counties. The Catholic high school nearest to Petoskey, St. Mary’s of Gaylord, is located about 40 miles away in Otsego County.

28. St. Michael opened its doors in the fall of 2013 and graduated its first class in the spring of 2017. In the fall of 2018, St. Michael Academy was recognized by the State of Michigan as an official non-public school, and in the fall of 2019, St. Michael was invited to join the Chesterton Network of Catholic Classical Schools, the largest such network in the country, with a nationally recognized and accredited curriculum. St. Michael also works closely with the Institute for Catholic Liberal Education (ICLE), and in the Fall of 2020 became an official member of the National Association of Private Catholic Independent Schools (NAPCIS), a top accrediting agency for Catholic Classical Schools in the United States.

¹⁶ Bloom, Howard, Barajas, Julia, “Failing Grades Surge For Poor L.A. Students Amid COVID-19,” *Los Angeles Times*, Nov. 2, 2020, <https://www.latimes.com/california/story/2020-11-02/failing-grades-surge-poor-la-students-covid-19> (accessed Dec. 9, 2020)

¹⁷ St. George, Donna, “Montgomery County Schools Report Big Spike in Failing Grades,” *The Washington Post*, Dec. 3, 2020, https://www.washingtonpost.com/local/education/montgomery-county-failing-grades/2020/12/03/913affd0-34fb-11eb-8d38-6aea1adb3839_story.html (accessed Dec. 9, 2020)

29. **Shared Mission with the Catholic Church.** St. Michael Academy is a Catholic school whose mission—to educate, evangelize, and form the character of young people—is inextricably intertwined with the salvific mission of the Catholic Church as a whole.

30. The Catholic Church, which claims “the right and the obligation to proclaim the Gospel to all nations (cf. Matt. 28:20),”¹⁸ takes upon itself—its bishops, teachers, parents and concerned lay leaders—the accompanying duty to educate the young.¹⁹ Catholic schools like St. Michael Academy “are places for the evangelization of the young ... they are ‘the privileged environment in which Christian education is carried out.’”²⁰ Catholic schools are said to “proceed from the very heart of the Church.”²¹ The Church believes that “[all] Catholic children ... have a right to a Catholic education.”²²

31. As explained by the Holy See, **the five essential marks of a Catholic school** are: (1) it is founded on a supernatural vision, (2) it is founded on Christian anthropology, (3) it is animated by communion and community, (4) it is imbued with a Catholic worldview throughout its curriculum, and (5) it is sustained by Gospel witness.²³ Exhibit 5, ¶¶ 14, 20.

32. **First mark.** That St. Michael Academy is inspired by a supernatural vision, the first mark of a Catholic school, is expressed in her motto, *Fides et Ratio*, or, “Faith and Reason.” St. Michael styles itself as “both a ‘college prep,’ and a ‘Heaven prep’ school, focused on developing the whole child—mind, body, and soul—always remembering that the ultimate goal is not merely success in this world, but salvation in the next.” Exhibit 5, ¶ 12.

¹⁸Miller, Archbishop Michael J., CSB, Secretary, Congregation for Catholic Education, *The Holy See’s Teaching on Catholic Schools*, Sophia Inst. Press, Manchester, NH, 2006, p. vi. (“*Teaching on Catholic Schools*”)

¹⁹ *Id.*

²⁰ *Id.*, p. vii

²¹ *Id.*

²² *Id.*, p. 15

²³ *Id.*, p. 17

33. **Second mark.** St. Michael Academy is founded on Christian anthropology, the second essential mark of a Catholic school. Most basically, this means that Jesus Christ is held up as “both model and means.”²⁴ Thus, “Christ is not an afterthought or an add-on to Catholic educational philosophy; He is the center and fulcrum of the entire enterprise.”²⁵ Exhibit 5, ¶¶ 14, 20.

34. **Third mark.** The third essential mark of a Catholic school—being animated by communion and community—is also an integral part of St. Michael Academy’s character. Catholic philosophy acknowledges that “education is a thing of the heart,” and “authentic formation of young people requires the personalized accompanying of a teacher.”²⁶ Thus, “direct and personal contact between teachers and students is a hallmark”²⁷ of a St. Michael education, and the teachers’ “coherence of attitudes, lifestyle, and day-to-day behavior” greatly enhance what is taught.²⁸ Interaction of students and teachers as a devout, prayerful community is manifested by prayer, scripture study, the celebration of Holy Mass, and the availability of the sacrament of confession. *See* Exhibit 5, ¶¶ 14-15, 18-20.

35. **Fourth mark.** As its fourth essential mark, St. Michael Academy’s curriculum is imbued with a Catholic worldview. In their required humanities classes, for example, St. Michael students learn how the Church’s relationship with the secular order has driven the philosophy, history, and great literary works of the West. Math and science are informed by the Catholic premise that there is a Creator, not just randomness and disorder. Politics and economics are considered in light of Catholic moral teaching. Latin is taught for its rigor, logic, importance to the

²⁴ *Teaching on Catholic Schools*, p.23

²⁵ *Id.*, p. 24

²⁶ *Id.*, p. 36 (citation omitted)

²⁷ *Id.*, p. 37

²⁸ *Id.*

Church, and relationship to modern languages. The fine arts are studied for their beauty—for God is the author of beauty, goodness, and truth. St. Michael’s teachers employ the Socratic method²⁹ where appropriate as a means of fully engaging and energizing their students. *See* Exhibit 5, ¶ 17.

36. **Fifth mark.** The fifth essential mark of a Catholic school, that it is sustained by gospel witness, focuses on the vocations of teachers and their participation in the Church’s evangelizing mission.³⁰ At St. Michael Academy, “[m]ore than a master who teaches, a Catholic educator is a person who gives testimony by his or her life.”³¹ This accords with the Holy See’s vision of Catholic instruction, wherein teachers “reveal the Christian message not only by word *but also by every gesture of their behavior*.”³² Indeed, the inculcation of Christian virtue, whether cardinal (wisdom, justice, courage, and temperance) or theological (faith, hope and love) cannot be accomplished other than through personal witness, imitation and practice. Exhibit 5, ¶¶ 14-15, 18-20.

37. St. Michael Academy shares in the Catholic church’s mission, is integral to that mission, and bears the five marks which affirm its role. It is a key component of St. Michael’s purpose and educational philosophy that its students should be educated with a Catholic worldview in a communal, in-person environment. Conversely, St. Michael would be unable to fulfill its religious purpose and mission—or implement its religious educational philosophy—and its religious beliefs would be substantially burdened, if it were prohibited from offering in-person, in-class instruction to its students. *See generally*, Exhibit 5.

²⁹ This give-and-take learning style named for Socrates emphasizes retention, discussion, memorization, and mastery; it is far more effective in person than online.

³⁰ *Teaching on Catholic Schools*, page 53.

³¹ *Id.*

³² *Id.*, page 53.

38. **COVID-19 response.** Based on its own research, and on Michigan’s *Safe Schools Roadmap*,³³ St. Michael prepared and implemented a back-to-school plan for the Fall of 2020 that incorporated safety protocols designed to reduce the risk of transmission of the COVID-19 virus, including masking, social distancing, specialized lunch arrangements, temperature checks, routine cleaning and disinfecting, parent-staff-student communications, visitor policies, illness policies, and more. *See* Exhibit 5, ¶¶ 21-22 & Ex. D.

39. Because Emmet County was considered to be “Phase 5,” *i.e.*, low risk, when school started in August, 2020, St. Michael had significant discretion regarding its implementation of *Safe School* protocols. Plaintiff exercised its discretion in favor of adopting many of those protocols, including:

- Temperature checks for teachers and staff each morning upon entering the school.
- Temperature checks for students who exhibit COVID-19 symptoms during the school day.
- Frequent hand washing, and the addition of hand-sanitizing stations.
- Set-up of classrooms to provide social distancing.
- Masking as required.
- Limitations on the use of shared objects such as lab equipment and musical instruments and supplies, and cleaning of same between uses.
- Small class size: Most St. Michael classes have 6-8 students; class sizes range from 5-14 students.
- Routine and frequent cleaning and disinfecting of classrooms, restrooms, lunchrooms, meeting rooms, libraries, study halls, chapel and entrance and exit-ways.
- Lunch in small groups.

³³ Whitmer, Gretchen, “MI Safe Schools: Michigan’s 2020-21 Return to School Roadmap,” COVID-19 Task Force on Education Return to School Advisory Council, June 30, 2020, https://www.michigan.gov/documents/whitmer/MI_Safe_Schools_Roadmap_FINAL_695392_7.pdf (accessed Dec. 9, 2020)

- Encouragement of students, teachers, and staff to stay home if feeling ill.

40. To date, St. Michael Academy's mitigation efforts have been highly effective, and have resulted in the school experiencing zero cases of COVID-19 infections.

Effect of Director Gordon's November and December Orders

41. Since November 18, 2020, Director Gordon's Orders (Exhibits 1 and 2) have prevented St. Michael Academy from exercising its fundamental right to the free exercise of religion, carrying out its religious purpose and mission, implementing its religious philosophy, and from fulfilling its religious vision.

42. Director Gordon's announcement on December 7, 2020, of a 12-day extension of what was originally a "three-week pause"³⁴ of in-person high school instruction indicates that St. Michael now faces the prospect of indefinite future lock-downs which impinge on its fundamental constitutional rights.

43. Without in-person instruction, St. Michael Academy is unable to provide the Christ-centered, communal academic environment required for its students to grow and develop in accordance with its religious purpose, mission and vision. It will be unable to offer twice-weekly Mass or confession, and it will be unable to engage in the corporate prayer and discussion of scripture that are key components to its Catholic, classical curriculum. It will be unable to provide the in-person group experiences central to developing Christ-like scholars, leaders, and servants who will spread the Gospel. It will be unable to provide the in-person interaction with St. Michael

³⁴ A "three week pause" is how the MDHHS press release described the shut-down it ordered on November 15. See MDHHS Press Release, November 15, 2020, <https://www.michigan.gov/coronavirus/0,9753,7-406-98163-545138--,00.html>

Academy's carefully selected instructors and staff needed to inspire its students to know, love and serve God, and to correspond to examples of virtue.

44. St. Michael Academy has a sincerely held religious belief that it is called to offer in-person religious formation and academic instruction to its students. It is imperative to St. Michael's religious purpose, mission and vision, and its classical, Catholic philosophy, that St. Michael continue in-person instruction, not only for grades K through 8, but also for grades 9 through 12.

45. The current Order is an arbitrary order that, while closing down St. Michael Academy's high school, nevertheless permits many other types of gatherings that pose similar or greater risks of COVID-19 transmission and infection, and that are unprotected by the Free Exercise clause of the United States Constitution.

46. For example, retail establishments, libraries, and museums are permitted to remain open while following certain protocols. Exhibit 2, ¶ 4(a). Businesses following the MIOSHA protocols issued on October 14, 2020 are permitted to remain open. *Id.* at ¶ 2(c)(3). In-person instruction of school children in prekindergarten through grade eight is permitted. *Id.* at ¶ 2(c)(6). Facilities offering "non-essential personal care services, including hair, nail, tanning ... body art, and piercing services ... are ... permitted [as long as participants wear masks]." *Id.* at ¶ 4(f). Gatherings are permitted at schools for childcare programs. *Id.* at ¶ 5(c). Gatherings are permitted at schools for the purpose of "tutoring and academic support." *Id.* Gatherings are permitted at "trade schools" and "career schools" for the purpose of providing "technical education services." *Id.* at ¶ 5(f). Gatherings are permitted for "substance use disorder support groups." *Id.* at ¶ 2(c)(9).

47. Gatherings at places of worship, which are protected by the Free Exercise clause, are not expressly addressed in the current Order, however places of worship, owners of places of

worship, and individuals engaging in worship are specifically *exempted from any penalty under the Order*. *Id.* at ¶ 10(d)

COUNT I
Violation of the Free Exercise Clause of the First Amendment
to the United States Constitution

48. The allegations in each of the foregoing paragraphs 1-47 are incorporated as if fully set forth herein.

49. The First Amendment of the U.S. Constitution provides that, “Congress shall make no law... prohibiting the free exercise of religion.”

50. Pursuant to the First and Fourteenth Amendments, state government officials may not burden the “free exercise” of religion. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

51. If government burdens religious exercise, it must do so with laws that are both neutral toward religion, and of general applicability. *See Emp’t Div. v. Smith*, 494 U.S. 872, 884 (1990). Otherwise, the law must overcome strict scrutiny. *Id.*; *see also*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (government cannot target religious activity for disfavored treatment without satisfying “the most rigorous of scrutiny”).

52. It is not enough for the state to treat religious conduct like “*some* secular” activities. *Roman Catholic Diocese of Brooklyn v. Cuomo*, -- S. Ct. --, 2020 WL 6948354, at *8 (Nov. 25, 2020) (Kavanaugh, J., concurring) (citing *Lukumi*, 508 U.S. at 537-38.).

53. Once the state starts applying less-restrictive rules to a “favored class” of secular conduct, “the state must justify why [religious institutions] are excluded from that favored class.” *Id.* (citing *Lukumi*, 508 U.S. at 537-38). And the state cannot get around such a requirement by relying on “categorizations” of conduct that “lead to troubling results.” *See Diocese*, 2020 WL 6948354, at *2.

54. Just as in *Diocese*, Director Gordon's current Order prohibits gathering for religious education while failing to prohibit gathering for other, secular activities. *See Lukumi*, 508 U.S. at 537-38, 543-44.

55. Secular activities permitted by Director Gordon's orders include without limitation, gatherings in offices, gatherings in retail establishments, gatherings in libraries, gatherings in museums, gatherings for daycare, gatherings in schools for prekindergarten through eighth grade in-person instruction, gatherings in trade and career schools for education services, gatherings in schools for academic tutoring, gatherings on public transit, gatherings for "substance use disorder support groups," and gatherings in hair, nail, tanning, body art and body piercing service establishments. *See generally* Exhibit 2, and paragraph 46 of this Complaint, *supra*.

56. Director Gordon, in other words, has extended favorable treatment to a wide assortment of secular gatherings without providing any explanation as to why St. Michael Academy does not also receive such favor. *See Diocese*, 2020 WL 6948354, at *8.

57. Director Gordon's current Order is not narrowly tailored. It cannot satisfy the strict scrutiny test as applied to St. Michael Academy.

58. But for Director Gordon's current Order, St. Michael would offer in-person instruction and formation.

59. As a result of Director Gordon's current Order, St. Michael is suffering and will continue to suffer irreparable injury.

60. It is axiomatic that, "[l]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese of Brooklyn*, 2020 U.S. LEXIS 5708, at *6 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

61. Thus, it remains the case that, “even in a pandemic, the Constitution cannot be put away and forgotten.” *Diocese*, 2020 WL 6948354, at *3.

68. The First Amendment prohibits Defendant from violating Plaintiff’s right to the free exercise of religion.

69. Director Gordon’s current Order violates Plaintiff’s fundamental right to the free exercise of religion because as applied to Plaintiff, it is not least restrictive method by which Defendant can fulfill his compelling government interest to stop the spread of the COVID-19 virus.

70. Defendant has alternative, less restrictive means to achieve any interest that he may have.

71. Without declaratory and injunctive relief, Plaintiff St. Michael Academy will be irreparably harmed.

WHEREFORE, Plaintiff asks this Court for the following relief:

- A) A declaration that the Defendant’s current Order (the December 7, 2020, MDHHS order attached as Exhibit 2), as applied to in-person instruction for grades 9-12 at St. Michael Academy, violates Plaintiff’s fundamental First Amendment Right to the Free Exercise of Religion; and
- B) An order expressly allowing St. Michael Academy to conduct in-person instruction of all of its students at either a “Phase 5” or “Phase 6” level of implementation of Michigan’s *Safe Schools Roadmap* as a means to ensure the health and welfare of its students; and
- C) A Temporary Restraining Order, preliminary injunction, and permanent injunction prohibiting Defendant and any of his officers, agents, and employees and other persons who are in active concert or participation with him, from enforcing his December 7, 2020,

MDHHS order (also the “current Order”, *i.e.*, Exhibit 2), or any subsequent extension of such order, against Saint Michael Academy; and

- D) An award of nominal damages; and
- E) An award reasonable attorney fees costs and expenses pursuant to 42 U.S.C. §1988 and other applicable law; and
- F) An award of other and further relief as this Court should find just and proper.

Respectfully Submitted,

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By: /s/Richard Thompson (P21410)
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Dated: December 11, 2020

VERIFICATION

I declare under penalty of perjury that I have read the complaint, I have personal knowledge of its contents, I know or believe that the allegations to be true, and further that, as to the allegations that I do not have personal knowledge of, I know or believe them to be true.

/s/Richard A. Brake (w/consent)
Richard A. Brake, Headmaster
Headmaster, St Michael Academy